

§ 655.76 Appeal of administrative law judge decision.

(a) The WHD Administrator or an employer desiring review of the decision and order of an administrative law judge, including judicial review, shall petition the Department's Administrative Review Board (Board) to review the decision and order. To be effective, such petition shall be received by the Board within 30 calendar days of the date of the decision and order. Copies of the petition shall be served on all parties and on the administrative law judge.

(b) No particular form is prescribed for any petition for the Board's review permitted by this subpart. However, any such petition shall:

- (1) Be dated;
- (2) Be typewritten or legibly written;
- (3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;
- (4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;
- (5) Be signed by the party filing the petition or by an authorized representative of such party;
- (6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and
- (7) Attach copies of the administrative law judge's decision and order, and any other record documents which would assist the Board in determining whether review is warranted.

(c) Whenever the Board determines to review the decision and order of an administrative law judge, a notice of the Board's determination shall be served upon the administrative law judge, upon the Office of Administrative Law Judges, and upon all parties to the proceeding within 30 calendar days after the Board's receipt of the petition for review. If the Board determines that it will review the decision and order, the order shall be inoperative unless and until the Board issues an order affirming the decision and order.

(d) Upon receipt of the Board's notice, the Office of Administrative Law Judges shall within 15 calendar days

forward the complete hearing record to the Board.

(e) The Board's notice shall specify:

- (1) The issue or issues to be reviewed;
- (2) The form in which submissions shall be made by the parties (e.g., briefs); and
- (3) The time within which such submissions shall be made.

(f) All documents submitted to the Board shall be filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-5220, Washington, DC 20210. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Board until actually received by the Board. All documents, including documents filed by mail, shall be received by the Board either on or before the due date.

(g) Copies of all documents filed with the Board shall be served upon all other parties involved in the proceeding.

(h) The Board's final decision shall be served upon all parties and the administrative law judge.

§ 655.80 Notice to OFLC and DHS.

(a) The WHD Administrator shall, as appropriate, notify DHS and OFLC of the final determination of a violation and recommend that DHS not approve petitions filed by an employer. The Administrator's notification will address the type of violation committed by the employer and the appropriate statutory period for disqualification of the employer from approval of petitions.

(b) The Administrator shall notify DHS and OFLC upon the earliest of the following events:

- (1) Where the Administrator determines that there is a basis for a finding of violation by an employer, and no timely request for hearing is made; or
- (2) Where, after a hearing, the administrative law judge issues a decision and order finding a violation by an employer, and no timely petition for review is filed with the Department's Administrative Review Board (Board); or
- (3) Where a timely petition for review is filed from an administrative law judge's decision finding a violation and the Board either declines within 30

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days to entertain the appeal, or reviews and affirms the administrative law judge's determination; or

(4) Where the administrative law judge finds that there was no violation by an employer, and the Board, upon review, issues a decision holding that a violation was committed by an employer.

§ 655.81 Application filing transition.

(a) *Compliance with these regulations.* Except as provided in paragraphs (b) and (c) of this section, employers filing applications for H-2B workers on or after the effective date of these regulations where the date of need for the services or labor to be performed is on or after October 1, 2009, must comply with all of the obligations and assurances in this subpart. SWAs will no longer accept for processing applications filed by employers for H-2B workers for temporary or seasonal non-agricultural services on or after January 18, 2009.

(b) *Applications filed under former regulations.* (1) For applications filed with the SWAs serving the area of intended employment prior to the effective date of these regulations, the SWAs shall continue to process all active applications under the former regulations and transmit all completed applications to the appropriate NPC for review and issuance of a labor certification determination.

(2) For applications filed with the SWAs serving the area of intended employment prior to the effective date of these regulations that were completed and transmitted to the NPC, the NPC shall continue to process all active applications under the former regulations and issue a labor certification determination.

(c) *Applications filed with the NPC under these regulations.* Employers filing applications on or after the effective date of these regulations where their date of need for H-2B workers is prior to October 1, 2009, must receive a prevailing wage determination from the SWA serving the area of intended employment. The SWA shall process such requests in accordance with the provisions of § 655.10. Once the employer receives its prevailing wage determination from the SWA, it must

conduct all of the pre-filing recruitment steps set forth under this subpart prior to filing an *Application for Temporary Employment Certification* with the NPC.

[73 FR 78052, Dec. 19, 2008. Redesignated at 74 FR 25985, May 29, 2009]

EFFECTIVE DATE NOTE: At 74 FR 25985, May 29, 2009, § 655.5 was redesignated as § 655.81 and suspended, effective June 29, 2009.

Subpart B—Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers)

SOURCE: 75 FR 6959, Feb. 12, 2010, unless otherwise noted.

§ 655.100 Scope and purpose of subpart B.

This subpart sets out the procedures established by the Secretary of the United States Department of Labor (the Secretary) under the authority given in 8 U.S.C. 1188 to acquire information sufficient to make factual determinations of:

(a) Whether there are sufficient able, willing, and qualified United States (U.S.) workers available to perform the temporary and seasonal agricultural employment for which an employer desires to import nonimmigrant foreign workers (H-2A workers); and

(b) Whether the employment of H-2A workers will adversely affect the wages and working conditions of workers in the U.S. similarly employed.

§ 655.101 Authority of the Office of Foreign Labor Certification (OFLC) Administrator.

The Secretary has delegated her authority to make determinations under 8 U.S.C. 1188 to the Assistant Secretary for the Employment and Training Administration (ETA), who in turn has delegated that authority to the Office of Foreign Labor Certification (OFLC). The determinations are made by the OFLC Administrator who, in turn, may delegate this responsibility to designated staff members; e.g., a Certifying Officer (CO).